NO. 83640-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANNY BARBER,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 37989-9-II
Kitsap County Superior Court No. 07-1-01380-4

SUPPLEMENTAL BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

James Reese
612 Sidney Ave.
Port Orchard, WA 98366

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DATED March 10, 2010, Port Orchard, WA
Original: Supreme Court
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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES AND COURT RULES

MISCELLANEOUS

I. COUNTERSTATEMENT OF THE ISSUES

The parties and the court below agreed Barber's plea was involuntary because he was not advised that his felony DUI conviction was subject to a term of community custody. Barber elected specific performance of the plea agreement rather than withdrawal of his plea.

The question presented is whether the remedy of specific performance requires the trial court to follow the State's sentencing recommendation. The issue also calls into question the foundation of the rule that specific performance is the proper remedy in cases of mutual mistake in the formation of a plea agreement.

II. STATEMENT OF THE CASE

The Court of Appeals set forth the relevant facts and procedure in its opinion:

> On November 16, 2007, the State charged Barber by amended information with one count of felony driving under the influence of intoxicants (felony DUI). Barber entered into a plea agreement whereby he agreed to plead guilty and the State agreed to recommend 51 months of confinement and no community custody.[2]
>
> [2] The plea agreement listed several boxes that the parties could check indicating a community custody range. None were checked.
>
> When accepting Barber's plea, the trial court asked if community custody was required for Barber's offense. Barber's counsel replied, "I don't believe so, Your Honor. That is surprising to me as well." RP (Nov. 16, 2007) at 4.

> The State did not respond. The trial court informed Barber that it was not bound by the plea agreement, accepted Barber's plea, and sentenced him to 51 months of confinement, a standard range sentence. The trial court did not impose a term of community custody.
>
> In April 2008, the Department of Corrections (DOC) notified the trial court that under RCW 9.94A.715(1), a mandatory term of 9 to 18 months of community custody applied to Barber's crime of felony DUI. It moved to modify Barber's judgment and sentence to add that term of community custody. The State and Barber agreed that Barber had the right to either withdraw his guilty plea or seek specific performance of the plea agreement. Barber chose specific performance. The State stated that while it was bound by the plea agreement, the trial court was not.
>
> At a May 23, 2008, hearing, the State recommended the trial court accept the plea agreement of 51 months of confinement but no community custody. The trial court again stated that it was not bound by the plea agreement and modified Barber's judgment and sentence to add a term of 9 to 18 months of community custody.

State v. Barber, 152 Wn. App. 223, ¶¶ 2-5, 217 P.3d 346 (2009).

Barber appealed from the resentencing. *Barber*, 152 Wn. App. at ¶ 5. The Court of Appeals concluded that the remedy of specific performance bound the State to its agreed-upon sentencing recommendation. *Barber*, 152 Wn. App. at ¶ 10. It further held, however, that the trial court was not bound by that recommendation. *Barber*, 152 Wn. App. at ¶ 15. The Court of Appeals therefore affirmed the amended sentence. *Id.*

III. ARGUMENT

THE REMEDY OF SPECIFIC PERFORMANCE UPON DETERMINATION THAT BARBER'S PLEA WAS INVOLUNTARY DID NOT BIND THE TRIAL COURT TO FOLLOW THE STATE'S ORIGINAL AGREED SENTENCING RECOMMENDATION; MOREOVER, THE REMEDY OF SPECIFIC PERFOMRANCE IN THE CONTEXT OF MUTUAL MISTAKE HAS A QUESTIONABLE PROVENANCE AT BEST.

Barber argues, as he did below, that specific performance is a proper remedy for his involuntary plea. Under *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988), he is correct. Barber further claims, however, that he is entitled to have the trial judge follow that recommendation. That contention is contrary to Washington law and sound public policy. However, if the specific performance rule requires the outcome sought by Barber, then that rule should be reconsidered in the context of a plea agreement based on mutual mistake.

1. Specific performance of a plea agreement does not bind the sentencing judge.

This Court has recognized two possible remedies where a defendant's plea was involuntary or the State breaches a plea agreement. *Miller*, 110 Wn.2d at 531; *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003). The defendant has the choice to either withdraw his plea and be tried anew on the original charges or receive specific performance of the agreement. *Id.* The defendant's choice of remedy controls, unless there are compelling

reasons not to allow that remedy. *Miller*, 110 Wn.2d at 535.

Here, Barber was not informed that he would be subject to a term of community custody for his felony DUI conviction, which rendered his plea involuntary, entitling Barber to withdraw his plea or to demand specific performance. *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). Barber chose the latter. The initial question is what constitutes specific performance.

The trial court accepted the State's concession that specific performance meant that the State was bound by its plea agreement and therefore was required to recommend a sentence without a community custody component. CP 56. The court further concluded, however, that the court was not similarly bound. CP 57 (*citing State v. Henderson*, 99 Wn. App. 369, 993 P.2d 928 (2000)). It therefore concluded that it could, and did, impose community custody. CP 59.

The trial court's conclusion was correct. In *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003), this Court endorsed the same reading of "specific performance" as did the Court of Appeals in *Henderson* and below:

> While the State must uphold its end of the plea agreement on remand, the court retains the ultimate decision on sentencing.

Harrison, 148 Wn.2d at 557 (*citing In re Powell*, 117 Wn.2d 175, 200, 814

P.2d 635 (1991)); *accord In re Lord*, 152 Wn.2d 182, 193 n.13, 94 P.3d 952 (2004) (although the defendant is entitled to specific performance by the State, "the sentencing court is still entitled to reject the State's recommendation."). Because the trial court and the Court of Appeals were correct, Barber's sentence should be affirmed.

Barber's reliance on *Miller*, *Turley*, and *Isadore* for a contrary rule is misplaced. In none of those cases was the issue of whether the trial court was bound by a plea agreement in issue. As noted in *Harrison* and like cases, the rule of law is emphatically that trial courts are not, and cannot, be bound by sentence recommendations in plea agreements. *See also* RCW 9.94A.431(2) ("The sentencing judge is not bound by any recommendations contained in an allowed plea agreement"). Barber is correct that in *Isadore* this Court did, as Barber asserts, order the defendant to be resentenced in accordance with the plea agreement. *See Isadore*, 151 Wn.2d at 303. It is quite clear from the opinion that the scope of specific performance was not litigated: "The State has not objected to the defendant's chosen remedy and in oral argument could not assert any reasons why specific performance would be unjust in this case." *Id.* Notably, no authority was cited in support of the order remanding for imposition of the agreed-upon sentence.

Barber's reliance on *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996), is also inapposite. That case holds that failure to advise a defendant

regarding community placement renders a plea involuntary. The State does not dispute this point. *Ross* sheds no light on the current issue, however, since the defendant therein sought to withdraw his plea. *Ross*, 129 Wn.2d at 288.

Nor does *State v. Schaupp*, 111 Wn.2d 34, 757 P.2d 970 (1988), assist Barber. The State generally agrees with his representations of the procedural history of that case. It disagrees with his apparent conclusion, however, that it mandates that the trial court is bound by a sentencing recommendation. To the contrary, although Schaupp was entitled to have his improperly vacated plea agreement reinstated, the Supreme Court remanded for resentencing. *Schaupp*, 111 Wn.2d at 42. Nothing in the opinion suggests that that resentencing required the trial court to follow any sentencing recommendation. Indeed, it appears that the plea agreement only concerned a reduction in charges, not a sentence recommendation. *Schaupp*, 111 Wn.2d at 35-36. This case thus sheds no light on the question presented here.

Nor is *State v. Banks*, 56 Md. App. 38, 466 A.2d 69 (1983), persuasive. That case's holding is based on a conception of the role of the court in the plea-bargaining process that is foreign to Washington law:

> If the judge accepts the plea agreement, he shall accept the defendant's plea in open court *and embody in his judgment the agreed sentence*, disposition or other judicial action encompassed in the agreement, or, with the consent of the parties, a disposition more favorable to the defendant than

that provided for in the agreement.

Banks, 466 A.2d at 73 (emphasis supplied). This is directly contrary to the Washington rule that the judge is not bound by a recommendation contained in plea agreement.

Moreover, the primary issue addressed and answered in *Banks*, was when a guilty plea was deemed entered for the purpose of determining whether jeopardy had attached. *Banks*, 466 A.2d at 73. Additionally, the issue of specific performance arose in the context of an alleged factual misperception on the part of the court, *Banks*, 466 A.2d at 74-75, not as here, where there was mutual mistake as to the law. In that context, the same court has held that "the appropriate remedy is to vacate the entire sentence and the corresponding plea agreement." *Rojas v. State*, 52 Md. App. 440, 450 A.2d 490, 493 (1982).

Schaupp cited *Banks* without discussion, but, particularly given the context involved, any endorsement of *Banks* can only go so far as the proposition that once a plea is accepted, the trial court may not withdraw the defendant's plea over the defendant's objection.[1] Nothing in *Schaupp* purports to alter the basic precept of the SRA that a trial judge is not bound

[1] This proposition is obviously subject exceptions for fraud, etc., on the part of the defendant. *See Banks*, 466 A.2d at 74.

by sentencing recommendations contained in plea agreements.

United States v. Holman, 728 F.2d 809 (6th Cir. 1984), suffers from the same infirmity as *Banks*: it comes from a jurisdiction where the judiciary has a fundamentally different role in the plea negotiation process than in Washington. *See* Fed. R. Crim. P. 11(c)(1)(c) ("the plea agreement may specify that an attorney for the government will ... agree that a specific sentence or sentencing range is the appropriate ... *such a recommendation or request binds the court* once the court accepts the plea agreement.") (emphasis supplied).

Moreover, after the federal system adopted a sentencing scheme similar to the SRA, the same Court concluded that *Holman* was no longer good law. Under the federal sentencing guidelines system, if it is determined that the proposed sentence is invalid, the court is not bound to accept the plea, and the defendant is given the option of either withdrawing the plea or allowing the court to impose a valid sentence. *United States v. Kemper*, 908 F.2d 33, 36-37 (6th Cir. 1990); *Fields v. United States*, 963 F.2d 105, 108 (6th Cir. 1992).

Barber fails to show that he trial court or the Court of Appeals erred. The opinion of the Court of Appeals upholding the trial court's order amending Barber's judgment and sentence should therefore be affirmed.

2. *If* Miller *requires the superior court to be bound by an illegal sentencing agreement, then it is incorrect and harmful and should be reconsidered.*

Barber argues that the choice of specific performance is illusory if the trial court is not bound by the agreement. However, the choice is no more illusory than in any plea agreement. The defendant is always advised that the trial court is not bound by the State's recommendation. *See* CrR 4.2(g)(6)(h).

The apparent inconsistency arises in part because the holding *Miller* itself did not logically flow from the precedent on which it was based. The prior case law applied where the State breached the plea agreement. Sound policy reasons exist in such circumstances to permit specific performance as a remedy. If withdrawal were the only remedy, the State would have incentive to simply breach an agreement for which it developed cold feet.

The *Miller* rule purports to required under the Due Process Clause of the Fifth Amendment, but the parameters of the constitutional rule are ill-defined, even as applied to breach cases. In *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the United States Supreme Court held that a plea agreement may be void if a prosecutor agrees to refrain from making a sentence recommendation, and then recommends the maximum term at the sentencing hearing. The Supreme Court held that the integrity of the plea bargaining system required that *unilateral* breeches not be tolerated, and the Court remanded the case to the state court to determine whether the

defendant should be allowed to withdraw his guilty plea, or whether the agreement should be specifically enforced, i.e. the defendant would obtain resentencing before a different judge where the prosecutor would make no sentencing recommendation. *Santobello v. New York*, 404 U.S. at 260-61.

Thus, the holding of *Santobello* is quite narrow, and is limited to situations involving a breach of plea agreement rather than an agreement voided by mutual mistake. The case says nothing about what should occur when the terms of the agreement call for an illegal sentence. No other United States Supreme Court case has addressed this precise issue.

State v. Cosner, 85 Wn.2d 45, 530 P.2d 317 (1975), appears to be the first case in Washington where an illegal plea bargain was specifically enforced. In *Cosner*, the Washington Supreme Court affirmed enforcement of plea agreements that called for a sentence less than the mandatory minimum sentence. The court's opinion contains no discussion whatsoever regarding the legal basis for the remedy. There is likewise no discussion of the policy implications of such a rule.

Miller was decided some 13 years later, and is the case most-frequently cited regarding the remedy to be applied when a plea agreement is breached. In *Miller*, the defendant and the State both erroneously believed that Miller could be sentenced to less than twenty years for a premeditated

murder. In fact, first degree murder carried a mandatory minimum sentence of twenty years. Upon learning this, Miller sought to withdraw his plea. The trial court refused, allowed him to argue for a lesser sentence, but ultimately imposed a twenty-year term.

Miller appealed and again asked for permission to withdraw the plea. The Court of Appeals reversed the trial court, reasoning that when a defendant enters a plea without understanding its sentencing consequences, the plea was not voluntary, and he should be permitted to withdraw it. *State v. Miller*, 48 Wn. App. 625, 626-28, 742 P.2d 723 (1987). The Court of Appeals also rejected the State's argument that the trial court had the authority to order specific performance of the plea agreement, and the case was remanded for plea withdrawal. *Miller*, 48 Wn. App. at 628-30.

The Supreme Court granted the State's petition for review and held that "[a]lthough this case does not involve a prosecutor's deliberate breach of a plea agreement, the defendant's preference as to remedy should be the primary focus of the court." *Miller*, 110 Wn.2d at 534. The opinion did not address the potential impact such a rule might have where the illegal sentence would trigger obligations by other state agents, and there was no discussion of whether the prosecutor should be able to bind a sentencing judge to a sentence not authorized by the legislature.

Four justices concurred in the result only, arguing that specific performance of an illegal sentence should not be permitted.

> There simply is no credible legal argument that can be made for the proposition that a court -- or, as in *Cosner*, another sentencing agency -- may exceed its statutory sentencing authority in order to enforce the terms of a plea agreement. See *In re Gardner*, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980). It is not surprising, therefore, that the *Cosner* opinion cites no authority and offers no explanation for its holding. *See Cosner*, 85 Wn.2d at 51-52. Nor is it astounding that, other than those cases which rely on *Cosner*, none can be found proclaiming the radical principle the majority today asserts.

Miller, 110 Wn.2d at 538 (Durham, J., concurring in the result).

Cosner has often been cited for the general proposition that an illegal sentence may be imposed where the prosecutor breached the plea agreement. *See State v. Tourtellotte*, 88 Wn.2d 579, 564 P.2d 799 (1977). But *Tourtellotte* involved a unilateral breach by the prosecutor -- there was no mutual mistake, nor was the agreement illegal. The prosecution simply tried to back out of a plea bargain when the victim objected to the deal, but after the plea had been accepted; the State was held to its bargain by this Court. To do otherwise, observed the Court, would encourage the prosecutor "to play fast and loose with an accused's constitutional rights to its advantage and his detriment." *Tourtellotte*, 88 Wn.2d at 585.

There are a host of significant policy issues inherent in holding that an illegal plea agreement may bind a trial judge to impose an illegal sentence.

Such questions were never fully addressed in *Cosner* or *Miller*, and the distinctions between those cases and *Santobello* should be explored to determine whether due process actually requires imposing the *Santobello* rule in cases like this one.

For one, the distinction between a breach and a mutual mistake is significant, as the former strikes at the heart of the plea process, whereas the latter does not. The language in *Santobello* was, after all, clearly driven by the specter of a prosecutor who reneged on a sentence recommendation, and the difficultly that causes a defendant who relied on the promise. Granting specific performance where the prosecutor unilaterally breaches is an important deterrent. Without such a deterrent, an unscrupulous prosecutor who is dissatisfied with the agreement reached by one of his deputies could undue the agreement simply by breaching the agreement and forcing the defendant to withdraw the plea. In such circumstances, it makes sense to "accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach are those of the defendant, not the State. *Miller*, 110 Wn.2d at 534 (*quoting Santobello*). But it is not at all clear that the Due Process clause requires the same approach for mutual mistakes.

Separation of powers considerations are also implicated. That doctrine ordinarily prevents a court from ordering a sentence that is not

authorized by the legislature's plenary power to establish punishment for crime, and it prevents the prosecutor from entering into a contract that would bind a judge to an illegal agreement. These separation of powers concerns are not present where the plea contemplates a legally authorized sentence.

The *Santobello* court did not address the policy considerations implicit in allowing a prosecutor or court to bind other state agencies, in violation of a statute passed by the duly-elected representatives of the citizenry. Permitting illegal sentences exposes agencies to civil liability, causes them to incur expenses by unfunded mandate, and potentially directs them to undertake duties for which they are ill-equipped.

Foreign authorities recognize these concerns and generally do not enforce illegal agreements. As noted previously, federal courts, for example, permit plea withdrawal but not specific performance as to an illegal agreement. If a plea bargain is based on promise that the trial court lacks authority to fulfill, and the defendant is induced to plead guilty by that promise, plea withdrawal is necessary to return the parties to their original positions. *Brady v. United States*, 397 U.S. 742, 755, 90 S. Ct. 1463 (1970). But there can be no plea bargain to an illegal sentence. *Baker v. Barbo*, 177 F.3d 149, 155 (3rd Cir. 1999). A sentence is illegal when it is greater or lesser than the permissible statutory penalty for the crime. *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999). Even when a defendant,

prosecutor, and the court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law. *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002). A defendant is entitled to withdraw a guilty plea when the sentence contemplated and entered into is illegal. *Smith v. United States*, 321 F. 2d 954, 955 (9th Cir. 1963); *see also United States v. Williams*, 198 F.3d 988 (7th Cir. 1999) (illegal agreement was void where a mutual mistake was key to the agreement); *United States v. Kuhl*, 816 F. Supp 623 (S.D. Cal. 1993) (under contract principles, agreement based on mutual mistake should be rescinded, not reformed).

Likewise, the majority of states do not permit a defendant to bind a judge to an illegal sentencing agreement. *See* e.g. *Coy v. Fields*, 200 Ariz. 442, 27 P.3d 799 (2001); *People v. Jackson*, 121 Cal. App. 3d 862, 176 Cal. Rptr. 166 (1981); *People v. Jones*, 985 P.2d 75 (Colo. App. 1999); *Chae v. People*, 780 P.2d 481, 487 (Colo. 1989) ("We have twice held that no sound public policy supports allowing defendants "a right to benefit from illegal sentences"); *State v. Ross*, 447 So. 2d 1380 (Fla. App.1984); *People v. Hare*, 315 Ill. App. 3d 606, 734 N.E.2d 515 (2000); *Rojas v. State*, 52 Md. App. 440, 450 A.2d 490, 493 (1982) ("When a material term of a sentence based upon a plea agreement is unenforceable, the appropriate remedy is to vacate the entire sentence and the corresponding plea agreement."); *State v. Garcia*, 582 N.W.2d 879, 882 (Minn. 1998) ("in sentencing the legislature

has the power to define the punishment for crimes, and the courts are the executor of legislative power."); *State v. Crawford*, 379 N.J. Super. 250, 877 A.2d 356, 258 (App. 2005) (there can be no plea bargain to an "illegal sentence"); *State v. Nemeth*, 214 N.J. Super. 324, 519 A.2d 367 (App. 1986); *People v. Sheils*, 288 A.D.2d 504, 732 N.Y.S.2d 269, 270-71 (2001) (*quoting People v. Martin*, 278 A.D.2d 743, 718 N.Y.S.2d 445, 447 (2000) ("where a plea bargain includes an illegal sentence because the minimum imposed is less than is required by law the proper remedy is to vacate the sentence and allow the defendant who has been denied the benefit of the bargain to withdraw his guilty plea); *People v. Clark*, 176 A.D.2d 1206, 576 N.Y.S.2d 704, 705 (1991) (no court possesses "interest of justice jurisdiction to impose a sentence less than the statutory minimum."); *People v. West*, 80 AD.2d 680, 436 N.Y.S.2d 424, 425 (1981) ("Any sentence 'promise' at the time of plea is conditioned upon its being lawful and appropriate."); *State v. Wall*, 348 N.C. 671; 502 S.E.2d 585, 588 (1998) (agreement violated a consecutive/concurrent rule and was illegal; remedy was rescission); *see also Guilty Plea as Affected by Fact that Sentence Contemplated by Plea Bargain is Subsequently Determined to be Illegal or Unauthorized*, 87 A.L.R.4th 384 (1991 & Supp. 2001) (collecting additional cases); *contra Com. v. Zuber*, 466 Pa. 453, 353 A.2d 441, 445-46 (1976).

Thus, the weight of authority suggests that the *Santobello* rule is not

constitutionally required in this context, and that a different rule is more appropriate given the contract and separation of power principles at stake. If Barber is correct that *Miller* mandates the result he seeks, then *Miller* itself would appear to be both "incorrect and harmful," *Federal Way v. Koenig*, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009), and should be reconsidered.

IV. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals affirming Barber's amended sentence should be upheld.

DATED March 10, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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